

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QIU L. GONG,

Plaintiff,

v.

MBNA AMERICA BANK,

Defendant.

CASE NO. C04-2115JLR

ORDER

I. INTRODUCTION

This matter comes before the court on Defendant MBNA America Bank's ("MBNA") Motion to Dismiss (Dkt. # 12). Having read and considered all papers filed in support of and in opposition to these motions,¹ the court GRANTS Defendant's motion.

II. BACKGROUND

Plaintiff Qiu Gong ("Gong") opened a credit card account with Defendant MBNA in 1995. MBNA amended the credit card agreement a few years later to include a

¹On December 20, 2004, Gong prematurely filed a response in opposition to a motion to dismiss which the court struck as moot because MBNA had not yet filed such a motion (Dkt. # 10). The court has reviewed this response in considering MBNA's motion to dismiss in light of Gong's failure to file an opposition to the present motion.

1 binding arbitration provision that went into effect in February 2000. In April 2004,
2 pursuant to the amended credit card agreement, MBNA filed a claim against Gong in the
3 National Arbitration Forum (“the Forum”) to collect the balance due on Gong’s credit
4 card. The Forum entered an award for MBNA in the amount of \$19,415.80 against
5 Gong. Thereafter, MBNA filed a petition and a motion to confirm the arbitration award
6 in Whatcom County Superior Court. Gong filed a motion to stay proceedings in state
7 court and a motion to vacate the arbitration award in this court (Dkt. # 3).² Gong claims
8 the arbitration award should be vacated because the original credit card agreement
9 between the parties contained neither a provision allowing MBNA to amend the
10 agreement, nor an arbitration provision, and further because he never received notice of
11 an amendment to the original agreement requiring arbitration. MBNA seeks to dismiss
12 this action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.
13

14 III. DISCUSSION

15 A. Legal Standard

16 On a motion to dismiss for lack of subject matter jurisdiction, the moving party
17 may challenge jurisdiction on the face of the pleadings or by presenting extrinsic
18 evidence. Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).
19 Where jurisdiction and the merits are intertwined, the court must “assume[] the truth of
20 the allegations in a complaint . . . unless controverted by undisputed facts in the record.”
21 Id. (quoting Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)).
22

23 In the Ninth Circuit, it is “well established that even when a petition is brought
24 under the Federal Arbitration Act (FAA), a petitioner seeking to confirm or vacate an
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27 ²The court construed Gong’s motion to vacate as a complaint and directed MBNA to file
28 an answer under Fed. R. Civ. P. 12. Minute Order, Dkt. # 5, at 1.

1 arbitration award in federal court must establish an independent basis for federal
 2 jurisdiction.” Carter v. Health Net of California, Inc., 374 F.3d 830, 833 (9th Cir. 2004)
 3 (citing Southland Corp. v. Keating, 465 U.S. 1, n.9 (1984)); Moses H. Cone Mem’l Hosp.
 4 v. Mercury Constr., 460 U.S. 1, 25 n.32 (1983) (recognizing that FAA does create federal
 5 question jurisdiction under 28 U.S.C. § 1331).

6
 7 **B. Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction**

8 Gong’s complaint seeks an order vacating the arbitration award on the ground that
 9 the “arbitration was entered in and for MBNA without any authority and beyond the
 10 scope of the power of the arbitrator.” Compl. at 1. The complaint alleges that
 11 jurisdiction is proper pursuant to 9 U.S.C. §§ 10 and 12. Although sections 10 and 12 of
 12 the FAA provide notice requirements and grounds on which an arbitration award may be
 13 vacated by a court, neither provides independent federal question jurisdiction. Carter,
 14 374 F.3d at 835 (“[Section] 10 of the FAA . . . does not create federal question
 15 jurisdiction”); 9 U.S.C. § 12 (providing notice requirements only).

16
 17 Gong’s contention that federal question jurisdiction exists based on MBNA’s
 18 alleged failure to provide him with notice of the arbitration amendment, in alleged
 19 violation of the Fifth and Fourteenth Amendments, lacks merit. The Due Process Clause
 20 in both amendments generally applies to actions of state and federal governments, and not
 21 private persons. Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d
 22 483, 487 (9th Cir. 1974); see also Brentwood Acad. v. Tennessee Secondary Sch.
 23 Athletic Ass’n, 531 U.S. 288, 295 (2001). There is nothing in the record suggesting that
 24 MBNA is a state actor and therefore subject to the requirements of federal due process.
 25 Thus, the court grants MBNA’s motion to dismiss for lack of subject matter jurisdiction.
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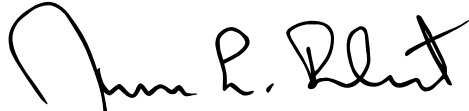
27 In addition, the court denies Gong’s alternative motion to enlarge time to vacate
 28 the arbitration award in state court by 30 days. Given that the court lacks subject matter

1 jurisdiction over this case, it does not have the power to extend such a deadline in state
2 court.

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4 **IV. CONCLUSION**

5 For all of the reasons stated above, the court GRANTS Defendant's Motion to
6 Dismiss (Dkt. # 12). Plaintiff's claims are DISMISSED with prejudice.

7 DATED this 22nd day of April, 2005.

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11 JAMES L. ROBART
12 United States District Judge
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